NATIONAL WILDLIFE FEDERATION, ET AL.

IBLA 96-535 Decided October 28, 1999

Appeal from a Decision Record/Finding of No Significant Impact of the State Director, Arizona, Bureau of Land Management, approving use of a spring in conjunction with periodic livestock grazing on a use area of an allotment. EA No. AZ-026-92-25.

Set aside and remanded.

1. Grazing and Grazing Lands--Grazing Leases: Generally--Water Pollution Control: Generally

   Under section 313(a) of the Clean Water Act of 1977, as amended, 33 U.S.C. § 1323(a) (1994), BLM is generally required to comply with state water pollution laws when engaged in any activity which may result in the runoff of pollutants. Under Arizona law, existing water quality is required to be protected and maintained in surface water designated as a "unique water."

2. Grazing and Grazing Lands--Grazing Leases: Generally--National Environmental Policy Act of 1969: Environmental Statements

   A BLM decision to allow cattle grazing at a spring based on a finding of no significant impact is properly set aside and remanded when it appears from the record that a "unique water" designated under state law in which existing water quality is required to be maintained and protected includes the entire length of the stream for which the spring is the headwater and that BLM failed to consider that fact in making its finding.

APPEARANCES: Thomas D. Lustig, Esq., and James J. Tutchton, Esq., National Wildlife Federation, Boulder, Colorado, for the National Wildlife Federation, et al.; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The National Wildlife Federation and other appellants have appealed from a July 17, 1996, Decision Record/Finding of No Significant Impact (DR/FONSI) of the State Director, Arizona, Bureau of Land Management (BLM), approving the use of Sycamore Spring, in conjunction with livestock grazing in the Santa Maria Ranch Allotment (No. 5046) in western Arizona. 1/

In April 1990, Erik and Tina Barnes, d.b.a. Santa Maria Ranch (Ranch), applied to BLM for a lease to graze 240 cattle on a yearlong (CYL) basis on the 27,573-acre public land portion of the Allotment. 2/ This land includes the area surrounding Sycamore Spring, located in the northwestern part of the Allotment, at the entrance to Peeples Canyon. The spring is situated in sec. 9, T. 12 N., R. 10 W., Gila and Salt River Meridian, Yavapai County, Arizona. Appellants describe the spring as a "desert oasis" situated at the "transition point from the hot, dry desert to the cool, moist environment of Peeples Canyon." (Notice of Appeal and Petition for Stay (NA/Petition) at 5.)

The public land at issue here is located within the Arrastra Mountain Wilderness Area, which was created by Congress on November 28, 1990. Section 101(a)(8), Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469, 4470. Since livestock grazing predates inclusion of the Allotment within that area, grazing and related activity (including range improvements) is permitted by section 4(d)(4) of the Wilderness Act of 1964, as amended, 16 U.S.C. § 1133(d)(4) (1994), and relevant Congressional guidelines and BLM regulations. See 104 Stat. 4473 (1990); 43 C.F.R. § 8560.4-1; Ex. L attached to BLM Response to Notice of Appeal and Request for Stay (Response) (H.R. Rep. No. 1126, 96th Cong., 2d Sess. (1980)) at 2.

In a May 31, 1991, Environmental Assessment (EA) (No. AZ-026-91-14) (hereinafter, 1991 Grazing EA (Ex. D attached to Response)), prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), BLM analyzed the environmental impacts of issuing a grazing lease for the Allotment and two alternatives thereto. Based on that EA, BLM issued a DR on May 31, 1991 (Ex. D attached to Response), in which it approved issuance of a grazing lease, subject to certain measures designed to mitigate or eliminate the environmental impacts of grazing.

1/ Additional appellants include The Wilderness Society, the Yuma Audubon Society, and the Palo Verde Group of the Sierra Club.

2/ Most of the public land in the Allotment (23,429 acres) is land acquired by the United States in exchanges with the State of Arizona on Nov. 7, 1984, and Mar. 9, 1988. The remainder of the land in the Allotment (18,947 acres) is State and private land.

The lessees were initially permitted to graze 129 CYL on the Allotment for 2 years. After that time, the authorized use was to be adjusted (within the overall 240 CYL grazing preference) based on annual monitoring studies and an ecological site inventory. After 5 years, the decision whether to adjust the preference itself was to be made. During the initial 5 years, authorized grazing use was to be rotated among eight grazing use areas, including one (Use Area No. 7) that encompasses Sycamore Spring. 3/ Rotation was to occur once key forage species utilization in the use area being grazed reached 50 percent, based on the following guidance:

> The upland portion of the allotment will be managed to allow for the various grazing areas to receive rest during critical growth periods on a rotational basis. Lengths of grazing periods will be flexible and may be adjusted depending on water and forage availability. Livestock would be rotated using the principles of the "Next Best Pasture" deferred rotation grazing system (Shmutz and Durfee, 1980) to determine the rotation sequence. The majority of the use areas will receive one years rest during each grazing cycle.

(1991 Grazing EA at 7.)

Peeples Canyon Creek is a stream which originates at Sycamore Spring and flows southeast through Peeples Canyon to the Santa Maria River. Although a stretch of the stream flowing from Sycamore Spring into the head of Peeples Canyon and a 1/4-mile segment commencing about 1/8 of a mile above South Peeples Spring are perennial, the stream is intermittent in large part. See Response at 18-19; Reply to Response at 7. Thus, BLM describes it as follows:

> [W]ater com[es] to the surface at certain spots along Peeples Canyon, pool[s] or run[s] along the surface for a short distance, and then disappear[s] into the coarse grained alluvium deposits. It appears that the only time a body of continuous running water flows from Sycamore Spring to South Peeples Spring and then to the Santa Maria River is after a major storm event.

(Response at 18.)

3/ Sycamore Spring is located within the larger "Sycamore Spring Use Area" which contains about 6,400 acres of public land. (Declaration of Jack Spears, BLM Rangeland Management Specialist, dated June 18, 1997 (Ex. B attached to BLM Reply to Appellants' Reply), at 2.) Appellants assert that the Spring is located in a 2-square-mile natural basin which consists mostly of slabs of rock with little or no palatable vegetation, and thus is capable of supporting no more than six cows yearlong (based on BLM's estimate of three cows per 640 acres). (NA/Petition at 13-14; see 1991 Grazing EA at 7.)

In order to protect the water quality of Peeples Canyon Creek as well as the sensitive natural resources (including wilderness, recreation, wildlife, and riparian values) downstream in the canyon, from potential degradation caused by unrestricted livestock access to the canyon, BLM provided at the time of the 1991 EA and FONSI for erecting protective fencing at Sycamore and South Peeples Springs:

> Prior to livestock being moved into use areas watered by Sycamore spring and South Peoples [sic] spring, gap fence South Peoples [sic] Spring and Sycamore Spring areas to prevent livestock access into these important water sources. To maintain the area's viability as a grazing use area, alternative water sources outside the Sycamore spring area shall be provided to protect riparian values as funding becomes available.

(1991 Grazing EA at 25; see id. at 15-23; DR, dated May 31, 1991, at 1.) BLM adopted this and other measures in its May 31, 1991, DR, and issued a FONSI based thereon. 4/ (DR, dated May 31, 1991, at 1-2; 1991 Grazing EA at 2.)

Thereafter, BLM undertook to consider the development of alternative water sources to Sycamore Spring in the Sycamore Spring Use Area of the Allotment. On appeal, BLM has explained that its commitment to provide an alternative water source for grazing in the Sycamore Spring Use Area was based on the fact that the Ranch holds a Permit (No. 33-90229) (Ex. C attached to BLM Answer), issued by the State on June 19, 1995, to appropriate water from Sycamore Spring for livestock grazing in that area. (BLM Response at 22.) 5/ Initially, BLM proposed to bring water from McGregor Spring to the area by means of 2 miles of surface pipeline and make it available to livestock using three water troughs and associated storage facilities. This project was described as the "McGregor Spring Water System." In addition, BLM proposed erecting the gap fencing provided for in its May 1991 DR, which it had not done.

Analysis by BLM of the proposed action and several alternatives thereto is found in a July 1996 EA (No. AZ-026-92-25) (hereinafter, 1996

4/ As adopted by BLM, the mitigation measure provides: "The proposed gap fence[] at Sycamore Spring * * *, as well as an alternative water source at Sycamore Spring[,] will be constructed prior to livestock being moved into the use area[] watered by th[is] * * * source[]." (DR, dated May 31, 1991, at 2.)

5/ Appellants have noted that State water rights do not dictate allowable uses of Federal lands, citing Hunter v. United States, 388 F.2d 148 (9th Cir. 1967). It is not clear from the record, however, that BLM regards itself as legally obligated to provide an alternative water source or to permit grazing near Sycamore Spring based on the water permit.

Water EA). Based on the EA, the State Director, in his July 1996 DR/FONSI, declined to adopt the proposed action and to construct the proposed system (even in a modified form), due to high construction costs, anticipated undesirable impacts from intrusion into the designated wilderness, and considerable public objection to the system (including by appellants). (1996 Water EA at 12, 25; Response at 22; NA/Petition at 9.)

Instead, the State Director approved "Alternative G," which provided for reconstructing an old "holding area" around Sycamore Spring with fencing and constructing an additional 400 feet of new gap fencing to bar access to Peeples Canyon. (1996 Water EA at 6, 25; Attachment to Declaration of Spears.) This alternative was generally designed to exclude livestock from Peeples Canyon, in order to protect its sensitive downstream natural resources. 6/ (1996 Water EA at 6, 25.) However, BLM provided that "Sycamore Spring within the holding area will serve as the water source for this use area of the allotment and it will be used seasonally by livestock." Id. at 6. Thus, periodic access by livestock to the spring and immediate surrounding area, in conjunction with grazing within the Sycamore Spring Use Area, would be permitted, followed by a period of rest. Id. at 25.

In his July 1996 DR/FONSI, the State Director also concluded that no significant impact would result from the adoption of Alternative G and, thus, preparation of an Environmental Impact Statement (EIS) was not required pursuant to section 102(2)(C) of NEPA. This appeal is brought from the State Director's July 1996 DR/FONSI. 7/

Appellants advance three principal arguments in support of their appeal. First, they contend that BLM's approval of the use of Sycamore Spring, in conjunction with livestock grazing in the Allotment, violates section 313(a) of the Clean Water Act of 1977 (CWA), as amended, 33 U.S.C. § 1323(a) (1994), since that action will result in the degradation of the quality of water in Peeples Canyon Creek. Appellants note that the Creek is considered a "unique water" under Ariz. Admin. Code (A.A.C.) § R18- 11-112.E (1996), and that relevant regulations provide that "existing water quality shall be maintained and protected" for such waters. A.A.C.

6/ Appellants describe Peeples Canyon as the "centerpiece" of the 126,760-acre Arrastra Mountain Wilderness Area and Sycamore Spring as a "significant attraction in its own right," since it is a "green, shaded, and watered oasis in a spectacular but harsh desert wilderness." (NA/Petition at 11-12.) They note that the narrow, deep canyon contains a riparian area, which provides valuable wildlife habitat, affording water, shade, shelter, and food for numerous species, including 15 Federal and State threatened, endangered, and other special status species. (Statement of Reasons for Appeal (SOR) at 3-4.)

7/ By order dated Oct. 11, 1996, we granted appellants' Petition for Stay of the effect of the State Director's July 1996 DR/FONSI, during the pendency of the instant appeal before the Board.

§ R18-11-107.D (1996). (SOR at 12-13 and Ex. B.) 8/ Further, appellants contend that the "unique water" designation applies to the entire length of the creek which begins at Sycamore Spring. Appellants also point out that the BLM 1996 Water EA acknowledges that water quality for this unique water may be changed. (SOR at 13.)

Citing the opinion of Dr. Robert D. Ohmart, a professor of zoology at Arizona State University, and BLM's 1982 Lower Gila North Draft Grazing EIS, which assessed the environmental impacts of authorizing grazing in the overall management area (including the Allotment), appellants assert that the impact of grazing around Sycamore Spring will be immediate and devastating and will only be exacerbated over time:

> Turning Sycamore Spring into a holding and watering area for cattle will amount to a virtual death sentence for its ecological and aesthetic values. In a hot, desert climate such as that in the Arrastra Mountain Wilderness, cattle congregate and linger at water sources. At small, isolated springs such as Sycamore Spring, the density of livestock becomes extremely high as cattle crowd around the small water source. In a matter of days, the concentrated livestock denude the spring of herbaceous vegetation, compact the soil surrounding the spring to a hard, pavement-like surface with their hooves, and fill the spring with [sediment and] manure and urine. In the longer term, the livestock destroy the overstory of trees by eating tree seedlings. As the existing trees age and die, there are no new trees to replace them. Eventually, a shaded oasis is transformed into a sun-baked cattle trough.

(SOR at 21-22; Ex. D attached to NA/Petition (Declaration of Ohmart, dated Aug. 26, 1996) (footnotes omitted).)

Appellants also contend that BLM violated NEPA. It is asserted that the FONSI for the 1991 decision to authorize grazing in the Allotment was predicated on fencing livestock out of Sycamore Spring. Hence, appellants argue that BLM must either prepare an EIS or alter its decision. (SOR at 16.) Additionally, appellants assert that BLM has failed to consider reasonable alternatives as required by NEPA. Id. at 16-17. In particular,

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8/ Appellants also originally maintained that BLM was obligated by section 401 of the CWA, 33 U.S.C. § 1341 (1994), to require the Ranch to obtain a certification from the State that grazing would comply with applicable water quality requirements before issuing a grazing lease. (NA/Petition at 16, citing Oregon Natural Desert Association v. Thomas, 940 F. Supp. 1534 (D. Or. 1996).) Appellants have withdrawn their section 401 certification argument on appeal, noting that the pertinent District Court holding in Thomas was overturned on appeal in Oregon Natural Desert Association v. Dombeck, 1998 WL 407711 (9th Cir., July 22, 1998). (Reply to BLM's Notice of Ninth Circuit's Decision at 2-3.)

appellants contend the failure to consider foregoing grazing in the basin around Sycamore Spring, which was the status quo after the prior EA, was arbitrary and capricious. Id. Appellants also argue that BLM failed to consider the "no action" alternative as required by NEPA in that it failed to consider foregoing grazing at Sycamore Spring. Id. at 17-18.

Appellants also argue that BLM violated the Federal Land Policy and Management Act of 1976 (FLPMA) by authorizing serious degradation of valuable resources for insignificant economic gain, citing the requirement to consider the relative value of the resources in multiple use management, 43 U.S.C. § 1702(c) (1994), and the obligation to prevent unnecessary and undue degradation, 43 U.S.C. § 1732(b) (1994). (SOR at 19.) Finally, appellants assert that in addition to degradation of water quality, grazing at the spring will adversely impact riparian vegetation and the associated habitat for desert animals as recognized by BLM in its 1982 EIS for grazing in the Lower Gila Resource Area. Id. at 20-22.

In its answer, BLM denies that the BLM decision will allow grazing cattle at Sycamore Spring to degrade water quality in violation of the CWA. (Answer at 19.) It is contended by BLM that the "unique water" designation applies to the 1/4-mile portion of Peeples Canyon Creek emerging as groundwater 1/8-mile upstream of South Peeples Spring and disappearing into the alluvium 1/8-mile downstream of the spring. Id. at 21-22. This segment of the creek is separated from Sycamore Spring by approximately 2 miles of dry channel, BLM contends. Id. at 22. Thus, BLM asserts that Sycamore Spring is not connected to the "unique water" segment of Peeples Canyon Creek by a continuous stream of surface water. Id. at 23. Further, BLM notes that the "unique water" nomination contemplated the continuation of existing livestock grazing, noting that "[n]atural geologic features exclude livestock * * * from the creek." (Unique Waters Nomination for Peeples Canyon Creek (October 1985), Ex. A to Answer, at 7.)

With respect to compliance with NEPA, BLM contends that it has taken a hard look at the environmental consequences of the proposed action. (Answer at 31.) Further, BLM argues that it has considered a reasonable range of alternatives, including a no-action alternative. Id. at 32-33, 37. Additionally, BLM asserts that it has complied with applicable provisions of FLPMA and that there is no basis for concluding that destruction of riparian habitat will result from the selected alternative. Id. at 38-39.

In reply, appellants note that the EA prepared by BLM acknowledges that unique waters may be changed as a result of the decision. (Appellants' Reply at 6.) Appellants assert that the only provision employed by BLM to protect water quality is annual monitoring and argue that annual monitoring is inadequate to either detect or preclude degradation of water quality. Id. at 8. In the context of an EA, appellants contend that reliance upon mitigation measures requires an analysis sufficient to show that any potential impacts will be insignificant. Id. Further, appellants argue under the terms of the designation of Peeples Canyon

Creek as unique water the classification includes Sycamore Spring and is not limited solely to that portion downstream of a point 1/8-mile upstream of the South Peeples Spring. Id. at 10-11. Appellants contend that even if the designation did not include Sycamore Spring, a tributary which does not have its own listed water quality standards is subject to the same water quality standards as the nearest listed downstream segment, i.e., the unique water downstream. Id. at 14. Appellants argue that the exclusion of cattle from Sycamore Spring was required because BLM found that use of the spring by cattle would degrade water quality and riparian habitat and the FONSI was based on this mitigation measure. Id. at 18. Additionally, appellants note that in a situation such as this where there was no grazing in the spring at the time the EA/FONSI was prepared, the no-action alternative which must be considered is that of foregoing grazing in the spring. Id. at 20.

In response, BLM asserts that if "monitoring efforts were to reveal the possibility of degradation [of a unique water] from BLM authorized action, the agency is automatically committed to mitigate such actions in order to maintain water quality." (Respondent's Reply to Appellants' Reply at 17.) With respect to the question of whether Sycamore Spring itself is a part of the unique water designation, BLM notes language in the document nominating Peeples Canyon Creek as a unique water suggesting an intent to limit the designation to that part of the creek in the vicinity of South Peeples Spring. Id. at 17-18. It is acknowledged by BLM, however, that regardless of the limited scope of the nomination, the Arizona Department of Environmental Quality (ADEQ) has held that the language of the rule establishing Peeples Canyon Creek as a unique water applies to the entire length of the creek including Sycamore Spring. Id. at 23, Ex. A. With respect to the asserted failure of BLM to consider the no-action alternative in the EA, BLM contends that the 1991 grazing decision did not constitute a decision to preclude grazing at Sycamore Spring indefinitely which would establish a status quo, but rather a determination to make changes at the close of the initial 5-year period. Id. at 34.

[1] Pursuant to section 313(a) of the CWA, BLM is required to "comply with[] all * * * State * * * requirements * * * respecting the control and abatement of water pollution," when it is "engaged in any activity resulting, or which may result, in the * * * runoff of pollutants." 33 U.S.C. § 1323(a) (1994). In addressing this provision in the context of enforcing the CWA it has been held that: "'The [CWA] has been amended to indicate unequivoca[l]ly that all Federal * * * activities are subject to all of the provisions of State * * * [water] pollution laws,'" provided they set forth objective, quantifiable standards subject to uniform application. Kelley v. United States, 618 F. Supp. 1103, 1107-08 (W.D. Mich. 1985) (quoting from S. Rep. No. 370, 95th Cong., 1st Sess. 67 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4392). This includes the regulation of point sources of pollution affecting surface waters, as well as the impact of nonpoint sources of pollution, including runoff, associated with cattle grazing on Federal lands. Oregon Natural Desert Association v. Dombeck, 1998 WL 407711, *6 (9th Cir., July 22, 1998).

Regulations at A.A.C. § R18-11-107.D (1996) provide that "[e]xisting water quality shall be maintained and protected in a surface water that is classified as a unique water pursuant to [A.A.C. §] R18-11-112 [(1996)]." "Peeples Canyon Creek" has been classified as a "unique water." A.A.C. § R-11-112.E.3 (1996). It appears from the language of the October 1995 document nominating Peeples Canyon Creek for designation as a unique water that the intent was to nominate the "segment" of the creek which "emerges as ground water 1/8 mile upstream of South Peoples [sic] Spring" which is "approximately 1/4 mile long" and which "disappears into deep alluvium 1/8 mile below South Peoples [sic] Spring." (Ex. A to Answer at 3.) This intent is confirmed elsewhere in the nomination where it is stated that: "No changes in existing livestock management are anticipated as a result of Unique Waters designation. Water quality was determined in Peoples [sic] Canyon Creek with existing levels of livestock and other resource uses. Natural geologic features exclude livestock and burros from the creek." Id. at 7. It appears from the record that this statement is true with respect to the 1/4-mile segment of Peeples Canyon Creek emerging from the ground 1/8-mile upstream of the South Peeples Spring. This area is within a canyon with topographic barriers to livestock access. This is not true of Sycamore Spring and the short portion of the creek downstream of Sycamore Spring where fencing is required to restrict access.

The regulatory designation, however, is not limited to the South Peeples Spring segment. Rather, the designation identifies "Peeples Canyon Creek, tributary to Santa Maria River." Although BLM takes the position that the unique water designation properly applies to the area nominated for its suitable characteristics, appellants contend that the designation applies to the entire stream originating at the point of origin at Sycamore Spring.

The record shows that, following the initiation of the present appeal, the Arizona State Director, BLM, in a letter dated April 23, 1997, posed certain questions to ADEQ concerning the unique waters designation for Peeples Canyon Creek. In her response, dated May 22, 1997, provided by BLM as Ex. A to Respondent's Reply to Appellants' Reply, the Acting Director, Water Quality Division, ADEQ, states at page 1 that the A.A.C. unique waters rule lists "Peeples Canyon Creek, tributary to Santa Maria River." "The exact wording of the listing indicates that the entire length of Peeples Canyon Creek has been designated as a unique water by the rule." Id. She states that when only a segment of a stream is intended for designation, that segment is specifically identified. She admits, however, that it is clear that only a 1/4-mile segment of Peeples Canyon Creek was originally nominated as a unique water. She explains that in the proposed rule the creek was identified as "Peeples Canyon Creek, tributary to the Santa Maria River," and that "[t]here is no documentation in the rulemaking docket which explains the extension. In all probability, the extension was not intentional." Id. at 3. She notes, however, that "[n]o one, including the Bureau of Land Management, pointed out any problem with the identification" in the rule. Id.

She stated that ADEQ would consider appropriate revisions to its rules "in the next triennial review that is tentatively scheduled for 1999" to segment the Peeples Canyon Creek and adopt appropriate water quality standards for its ephemeral and perennial parts and revise the unique waters description for the creek to limit it to the originally nominated segment.

In closing, she informed BLM that

> [u]ntil the unique water description and the water quality standards for Peeples Canyon Creek can be modified by rule, the current rules which relate to Peeples Canyon Creek remain enforceable. Under the current rules, Peoples [sic] Canyon Creek, in its entirety, has been designated a unique water. This means that the water quality standards that have been established and the stringent antidegradation provisions which apply to unique waters that are prescribed in [A.A.C. §] R18-11-107(D) apply to Peeples Canyon Creek in its entirety.

Id. at 4.

This letter establishes that while BLM's position that only a small portion of Peeples Canyon Creek about 2 miles below Sycamore Spring is a "unique water" has a strong basis in the nomination documentation, the "unique water" status, at the time of the issuance of the DR/FONSI, actually extended to the entire creek.

BLM contends that such a fact does not undercut the basis for its decision because the decision only states that "'water quality' for the segment of Peeples Canyon Creek which BLM assumed to be the unique water 'may be changed.'" (Respondent's Reply to Appellants' Reply at 23.) Change, BLM asserts, "does not necessarily mean degradation," and unless or until there is degradation, there is no violation of the CWA. Id.

It is clear, however, that BLM's DR/FONSI only considered the impact of the selection of Alternative G of EA No. AZ-026-92-25 on "unique water," as it interpreted the State's designation. Thus, BLM stated: "Water quality may be changed for the unique water two miles downstream on private land at South Peeples Spring." (1996 Water EA at 26.) As set forth above, the "unique water" designation includes all of Peeples Canyon Creek, tributary to the Santa Maria River. Thus, BLM should have considered the impact of Alternative G on the "unique water" of Peeples Canyon Creek from its headwaters at Sycamore Spring. Without assessing the impact of Alternative G on that water quality, BLM could not make an informed judgment regarding its action. In addition, the mitigation measures proposed by BLM were not designed by BLM to protect the "unique water" of Peeples Canyon Creek from its headwaters.

[2] Critical criteria applied in reviewing the sufficiency of the EA to support the FONSI with respect to the proposed action include whether

the record establishes that BLM took a "hard look" at the environmental consequences of the proposed action, identified the relevant areas of environmental concern, and made a reasonable finding that the impacts studied are insignificant, and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Maryland-National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Powder River Basin Resource Council, 120 IBLA 47, 56 (1991); Owen Severance, 118 IBLA 381 (1991). Where a FONSI is predicated on a finding that restrictions on a project will eliminate any significant environmental impact, NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Powder River Basin Resource Council, supra; Nez Perce Tribal Executive Committee, 120 IBLA 34 (1991); Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88, 91 (1990); see Cabinet Mountains Wilderness v. Peterson, supra at 682.

In this case, we must conclude, based on the fact that the State's "unique water" designation applied to the entire length of Peeples Canyon Creek, that BLM failed to take a "hard look" at the impacts of its selection of Alternative G. The stated purpose of the EA was to "provide an alternative water source in place of Sycamore Spring once the spring is fenced out." (1996 Water EA at 1.) Nevertheless, the selected alternative was to reconstruct a holding area around Sycamore Spring and allow livestock to use the water at Sycamore Spring while within the holding area. Although the holding area would only be used "seasonally" and the holding area would be closed when livestock were removed, the impact of that livestock use on the "unique water" of Peeples Canyon Creek from its headwaters at Sycamore Spring was not considered by BLM. Accordingly, we are unable to find that the record in this case supports the FONSI. See Powder River Basin Resource Council, supra.

With respect to the no-action alternative, we note that when preparing an EA for a proposed action BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. Southern Utah Wilderness Alliance, 122 IBLA 334, 339-40 (1992). Despite the history of grazing in this allotment and the commitment of BLM to consider changes to the grazing pattern in the allotment, the record discloses there was no grazing at Sycamore Spring at the time of the 1996 EA. Under these circumstances, the EA was required to consider a no-action alternative which did not involve grazing at Sycamore Spring. Although Alternative H which is labeled as a no-action alternative in the EA (1996 Water EA at 6) does not qualify as a no-action alternative in this context, Alternative E (1996 Water EA at 5) which involves construction of the gap fence at Sycamore Spring to preclude grazing access to the Spring and the canyon does qualify as a no-action alternative. Thus, we conclude that the EA was not lacking a no-action alternative.

Since we find the record in this case inadequate to support the BLM FONSI, we need not address appellants' arguments regarding BLM's compliance with FLPMA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision Record/Finding of No Significant Impact appealed from is set aside and the case is remanded to BLM for further consideration.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge